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No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

**NOAH RYAN ROBINSON,**

*Petitioner,*

vs.

**STATE OF SOUTH CAROLINA,**

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

I.

Whether the racially-motivated strike of a black unmarried female venire-person from the petit jury violated the equal protection principle of *Batson v. Kentucky*?

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**Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina**

## PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina entered on September 23, 1991.

## OPINION BELOW

The final judgment of the trial court was not printed in an official reporter.

The divided decision of the Supreme Court of South Carolina is reported as *State of South Carolina v. Noah*

*Ryan Robinson*, ____ S.C. ____, 409 S.E.2d 404 (1991). The Supreme Court of South Carolina decision was rendered on September 23, 1991. The opinion below is reprinted in the appendix to this petition, *infra*, at 1a-13a.

## JURISDICTION

The judgment of the Supreme Court of South Carolina affirming petitioner's conviction and sentence was entered on September 23, 1991. Petitioner filed a motion for rehearing/reconsideration which was denied on October 22, 1991 (order denying petitioner's motion for rehearing/reconsideration is reprinted in the appendix to this petition, *infra*, at 19a.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI, provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . to have the Assistance of Counsel for his defence."

United States Constitution, Amendment XIV, provides in part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Amidst a whirlwind of publicity, petitioner Noah Ryan Robinson—half-brother of Jesse Jackson—was indicted in Greenville County, South Carolina during August, 1988 on charges of obstruction of justice, intimidation of a witness, conspiracy, and accessory before and after the fact of a felony arising out of the 1987 stabbing of Janice Denise Rosemond. Miss Rosemond was a witness to the 1986 shooting death of Leroy "Hambone" Barber.

Subsequently, Robinson was again indicted in Greenville County (on November 29, 1988) for murder and criminal conspiracy to commit the murder of "Hambone" Barber. On October 24, 1988, the State served a Notice of Intention to Seek the Death Penalty based on the latter series of charges.

The backdrop for pre-trial and trial proceedings in Greenville County, South Carolina was awash in publicity and comprehensive coverage. The Solicitor "stipulated, agreed, admitted" that there had been "unprecedented" publicity (Tr. 30).

Proceeding on both indictments, jury selection and trial proceedings were had commencing January 16, 1989 before the Honorable James E. Moore. Robinson was represented by retained counsel. Preceding voir dire, juror questionnaires were provided to the court, solicitor, and defense. Such questionnaires detailed residence, employment history, education, marital/family status, and religious denomination. A "panel" system of juror selection was accepted by the court. Within the fabric of the jury selection proceedings, the Solicitor for the State passed

on every prospective petit juror (all of whom were white) until presented with the first black juror, at which point he exercised his first peremptory strike (Tr. 294).

*Batson* proceedings were conducted after the final jury was picked and before it was sworn, wherein defense counsel argued the Solicitor's discriminatory use of his peremptory strike against the first black prospective juror; the court accepted the State's allegedly "race-neutral" justification of "general instability" and denied the defense motion to set aside the jury (Tr. 510).

Following trial on both indictments, the jury returned a verdict of guilty on the charge of accessory after the fact of a felony for the Rosemond stabbing on January 28, 1989. Robinson was sentenced to a custodial term of ten (10) years. The jury was unable to return verdicts on the remaining charges levelled against Robinson,[1] a mistrial was declared as to those charges.

[1] Murder, criminal conspiracy to commit the murder of "Hambone" Barber, obstruction of justice, intimidation of a witness, criminal conspiracy, and accessory before the fact of a felony.

## REASON FOR GRANTING THE WRIT

### I.

### WHETHER THE RACIALLY-MOTIVATED STRIKE OF A BLACK UNMARRIED FEMALE VENIRE-PERSON FROM THE PETIT JURY VIOLATED THE EQUAL PROTECTION PRINCIPLE OF *BATSON v. KENTUCKY*.

> SOL. WATSON: And I submit we don't have a *Batson* problem.
>
> MR. SIMONE: Your Honor, it's gonna be a Robinson problem. It's going to be a new case and it's going to be Robinson v. South Carolina, that will be the problem. (Tr. 303)

This case presents a pressing question to the Court: whether a uniquely well-known and much publicized black criminal defendant is denied equal protection of law when a member of his race is discriminatorily struck from the petit jury by the solicitor for the state. Per this Court's continuing mandate of equal protection for all citizens, including the criminally accused, exclusion of black persons from the petit jury on account of race is unconstitutional and cannot stand. *Strauder v. United States*, 10 Otto 303, 100 U.S. 303 (1880); *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).[2]

At bar, the petitioner in question is the half-brother of Jesse Jackson, a highly visible and successful entrepreneur with business interests in Chicago, Illinois, Albuquerque,

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[2] As Robinson is pursuing relief predicated on equal protection grounds, this Court's recent decision in *Holland v. Illinois*, 493 U.S. 474 (1990), holding that the Sixth Amendment does not prohibit peremptory strikes of members of cognizable groups, does not affect this argument.

New Mexico, and Greenville, South Carolina, as well as being an influential black-community leader. Adding to petitioner's notoriety is the fact that he was criminally charged during presidential campaign primaries; the charges linked him to the El Rukns (a notorious black gang in Chicago). All of these circumstances were touted widely and repeatedly in the press during the period leading up to the trial. As urged below, these unique circumstances all combined to create the clear potential for *Batson* concerns—clear potential for prejudicial and inordinate focusing by non-black jurors on *who* petitioner is, rather than the substance and veracity of the *charges* levelled against him.

Preceding voir dire, juror profile questionnaires detailing residence, employment history, marital and family status, and religious denomination were provided to the court, solicitor, and defense counsel. This information was utilized in conducting voir dire. A "panel" system of juror selection was accepted by the court (Tr. 51-52). Excluding those excused by the court for various reasons including, *inter alia*, hardship, the solicitor for the state passed on every prospective juror (all of whom were white) until presented with Phyllis Shell (#162), the first black prospective regular juror, at which point he exercised his first peremptory strike (Tr. 294). The solicitor exercised his second (and final) peremptory strike against John Leaks (#A-97), a black man who was presented as a prospective alternate juror (Tr. 446). Shell and Leaks were two of the only four black persons presented on voir dire. Juror #25, Vicky Fritz-Hamilton was accepted by all parties and sat on the jury (Tr. 439); juror #A-20, Rachel Brown, was excused by the court for her expressed views against the death penalty (Tr. 448).

Notwithstanding petitioner's motion to either sequester Shell for the remainder of voir dire or excuse the remaining members of the panel and move on to the second panel (which the record reflects contained "a representative number of blacks", Tr. 302) the final jury consisted of eleven white members, one black member, and two white alternates (Tr. 502).

A *Batson* hearing (held after the jury was picked and before it was sworn) confirmed the solicitor's use of his peremptory strike against Phyllis Shell, based on his allegedly race-neutral reason of "general instability" (Tr. 507), which broke down into the following categories: "very erratic work history", unmarried mother of a child born out of wedlock, and exposure to publicity (Tr. 507-508). The trial judge ruled such justification to be racially neutral and denied the defense motion to set aside the jury (Tr. 510).

The legal question presented was rejected out of hand by the South Carolina supreme court majority.[3] Robin-

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[3] *See State of South Carolina v. Robinson*, ___ S.C. ___, 409 S.E.2d 404 (1991) (Finney, J. dissenting). Notwithstanding its review of the issue, the majority opinion mysteriously found that Robinson's argument of a pretextual/racially-motivated strike was not preserved on appeal—because Robinson "raised no issue to the trial judge regarding any alleged pretext". 409 S.E.2d at 407. For purposes of this petition, Robinson submits that the very essence of his *Batson* argument and motion to set aside the jury was that the striking of Phyllis Shell was pretextual because the solicitor's reasons were not racially neutral. See Tr. 295 (defense raises *Batson* issue, the only discernible difference between Shell and any other juror is that she is black); Tr. 503 (defense argues that solicitor has passed on similarly situated white jurors, and that there is a pattern of racial discrimination).

*Justice Finney, dissenting, found that the solicitor's striking of the black prospective juror was hardly "race-neutral" and urged the granting of a new trial*, 409 S.E.2d 404, 410; App. 12a-13a, *infra*.

son's petition for rehearing in the state supreme court, which raised, *inter alia*, the issue of the racially motivated peremptory strike, was similarly denied (Group App. 2a).

Historically, racial discrimination in the jury selection process has been outlawed in this country. See 18 U.S.C. § 243 (criminalizing the exclusion of individuals from jury service based on race). This Court has repeatedly underscored the imperative of racially neutral jury selection,[4] extending the shield of equal protection against a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice". *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965); *See also Batson*, 476 U.S. at 84 n.3 (collecting Supreme Court authority on point). As an intolerable manifestation of pernicious discrimination, race-based qualification of jurors erodes the fundamental precept of judicial integrity. *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 1366 (1991) (extending the equal protection argument where defendant and excluded juror are of different races); *Edmonson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 111 S.Ct. 2077, 2087 (1991) (settling a split in circuits while holding that private parties in *civil* litigation may not use racially motivated peremptory strikes); *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2834 (1990).

> Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure. *Batson*, 476 U.S. at 85.
>
> * * * *
>
> Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason

[4] *See Strauder v. United States*, 10 Otto 303, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880).

> at all, as long as that reason is related to his view concerning the outcome" of the case to be tried (citation omitted), the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant. *Batson*, 476 U.S. at 89.

The linchpin of a *Batson* claim of discriminatory peremptory strikes is a prima facia showing by the defendant and race-neutral justification by the state. *Batson*, 476 U.S. at 96-98; *State of South Carolina v. Jones*, 293 S.C. 54, 358 S.E.2d 701, 703 (1987) (setting out South Carolina procedure). Per the plurality decision in *Hernandez v. New York*, 500 U.S. ____, 111 S.Ct. 1859, 1866, 1871 (1991), discriminatory intent is critical; without such intent being evident, the reasons proffered will be considered neutral, and overturned only by a determination of clear error.

Central to the determination of neutrality are considerations of legitimacy of the state's reasons, and whether they are clear, specific, and related to the case. *State of South Carolina v. Tomlin*, 299 S.C. 294, 384 S.E.2d 707, 709 (1989). "Legitimacy" is subject to further scrutiny: whether the case is susceptible to racial discrimination, the prosecutor's demeanor, whether similarly situated white jurors were struck on equivalent grounds,[5] and

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[5] This consideration may no longer carry any legal weight, *see State of South Carolina v. Johnson*, 302 S.C. 243, 395 S.E.2d 167, 169 (1990) (court rejects appellant's claim that state must indicate whether the same standards were applied to white seated jurors.) *But see State of South Carolina v. Howard*, 295 S.C. 462, 369 S.E.2d 132, 139 (1988) (Finney, J. dissenting) (noting that prosecutor must "show that he challenged similarly situated members of the majority group on identical or comparable grounds as members

(Footnote continued on following page)

whether the explanation relates to the juror and the case. *Id.* at 710.

Certain of these factors can be handled forthwith. While the solicitor stated his reasons clearly and specifically, he in no way articulated how Shell's work history or single parenthood could be related to the case (especially since Shell's mother was available to provide childcare). As for susceptibility to racial discrimination and the solicitor's demeanor, the record makes clear that this prosecution was steeped in a morass of publicity and innuendo about racial discrimination; moreover, the solicitor's demeanor is evidenced by his filing of a memorandum containing alleged evidence of far-reaching criminal conduct, which was widely circulated in the media (Tr. 17-18).

In candor, *no* white jurors were excused for the same reasons, since it was not established that any white juror had borne a child out of wedlock or had switched jobs as Shell had (See Tr. 508). However, certain similarly situated jurors were seated. Shell had a high school education; seven seated jurors had high school or trade school educations. Only seven of the seated jurors were employed at the time. There was a single juror, a divorced juror, and a separated juror. Like Phyllis Shell, nine seated jurors were church-goers.[6]

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[5] *continued*
of the minority group.") *See also Williams v. Chrans*, 945 F.2d 926, 941 n.25 (7th Cir. 1991) (while refusing a retroactive application of *Batson*, court nevertheless considered a comparison of similarly situated jurors (both excused and seated), finding that the government's reasons for striking all blacks from the sentencing venire were "tenuous at best".)

[6] In the event that certiorari is granted, the juror questionnaires will be submitted in a joint appendix.

Taking the solicitor's reasons *seriatim*, it is clear that neither individually nor in combination can they provide *racially neutral* and *legitimate* reasons for excusing Phyllis Shell. As for her "very erratic work history" (Tr. 507), neither her juror questionnaire nor the transcript of proceedings reveals any period of unemployment or that she was ever cited as an unreliable/irresponsible/dishonest employee. Rather, the facts showed that she had been on her present job for four months, the previous job for one year, and the job before that for one and one half years (Tr. 290). The state cited to the opinion in *State of South Carolina v. Martinez*, 294 S.C. 72, 362 S.E.2d 641 (1987), for the proposition that chronic unemployment is a race-neutral reason to support a peremptory strike (Tr. 508); yet there is no evidence of chronic periods of unemployment in either the questionnaire or in the transcript. Thus, it is disingenuous for both the solicitor and the South Carolina supreme court[7] to base the exercise of a peremptory challenge against the first black potential juror on pure speculation without any factual basis.

The solicitor's second reason for excusing Shell was the fact that she had a two-year old child out of wedlock, was unmarried, and lived with her mother (Tr. 507). Serious reliance on the fact of a pregnancy visited on an unmarried woman and ensuing single parenthood as a legitimate reason for juror disqualification can only be attributed to chauvinistic, draconian, antiquated (non)thinking. Such reasoning, taken at face value, is fatuous at best. At no point during voir dire of Phyllis Shell did the solicitor attempt to determine the circumstances of the conception or birth.

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[7] *State of South Carolina v. Robinson*, ____ S.C. ____, 409 S.E.2d 404, 407 (1991).

Rather, counsel for the sovereign and both tribunals before which this issue has been argued have automatically attributed the situation to instability. All parties have been content to chalk the child up to instability or irresponsibility, without ever questioning the possibility that this was Phyllis Shell's choice.

Illegitimacy and single parenthood, whether desired or not, is a prevalent fact of life in the black community. To sanction state reliance on this fact as weighing *against* qualification for jury service is untenable; it would always tend to result in the disproportionate exclusion of black persons from service on the jury. *See* U.S. Bureau of Census, *Statistical Abstract of the United States: 1989*, (109th Edition), Washington, D.C. 1989, Table no. 89, at p. 64, Table no. 99, at p. 68. *See also Lynn v. Alabama*, 493 U.S. 945, 110 S.Ct. 351, 352 (1989) (Marshall, J. dissenting from denial of certiorari) ("[A]ny other factor closely related to race, should not be regarded as a legitimate basis for exercising peremptory challenges without some corroboration on voir dire that the challenged venirepersons actually entertain the bias underlying the use of that factor.")

Moreover, and constitutionally compelling, the use of legitimacy classifications as the measure when meting out "equal" treatment of individuals is unjustified per Fourteenth Amendment equal protection. *Reed v. Campbell*, 476 U.S. 852, 856 (1986). *Reed* states unequivocally that classifications of (il)legitimacy will not suffice to condone disparate treatment of individuals. *Id.* Further, the fact of an illegitimate child has no bearing whatsoever on the case being tried.

As to the solicitor's proffered reason of exposure to publicity, that argument is insupportable. At Tr. 292, Shell

stated that she had only seen "a little" on the news about the case, including seeing Robinson and the solicitor on television (Tr. 294). The solicitor then commented that he did not see Reverend Fleming in the courtroom,[8] to which Shell responded that she had seen him also, but did not really know what Reverend Fleming had said about the case (Tr. 294). When asked if she knew Reverend Fleming, Shell shook her head negatively (Tr. 294).

During the *Batson* hearing, the solicitor argued that Shell had given conflicting answers on her exposure to publicity, that she had seen Reverend Fleming, and that the Reverend was "the most outspoken person in the community concerning this being a racial prosecution." (Tr. 507). In support of his Reverend Fleming-argument, the solicitor than called the court's attention to video tape and various press releases, all presumably to show the Reverend's extensive involvement in the case.

The answer to this argument is that, first, the Reverend's name was not brought up to Shell in the form of a question, but rather as an offhand comment that the solicitor did not see him in the courtroom (Tr. 294). When Shell responded truthfully that she had seen the Reverend, she also explained that she did not know what he had said (Tr. 294). This is consistent with her previous statement at Tr. 292 that she had only seen a little about the case on the news in passing, but nothing in particular stuck out in her mind.

This is a far cry from other instances of exposure to media publicity by seated members of the jury who were accepted by the solicitor. Those seated jurors who ad-

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[8] Reverend Fleming is a staunch and vocal supporter of Noah Robinson, who championed Robinson's cause tirelessly.

mitted knowledge of the case from media publicity included Nancy K. Vaughn (#182) who saw/heard news clips on radio and television (Tr. 69); A. Christopher McKinney (#111) who read news accounts of the case (Tr. 174-175); Monica Carol Burrell (#24) who read news articles about the case (Tr. 204); Jacqueline Broyles (#21) who had read and heard various news accounts and believed the crime occurred in 1986 (Tr. 380); Vicky Fritz-Hamilton (#65) who had read news accounts, knew that Robinson was accused of murdering Hambone Barber and that a Chicago gang was involved (Tr. 435); Lavergne Belue (#10) who read about the details of the case and believed it was possible that Robinson might have something to do with Hambone Barber's death (Tr. 232-234). Most notably, when juror Joan Stiegerwald (#171) was questioned, she not only acknowledged familiarity with the details of the case from the news, she equivocated as to whether she could put aside her knowledge (Tr. 118).[9] Under cross-examination by defense counsel, she admitted to having formed an opinion that Robinson was guilty, but that she had not thought about it lately (Tr. 122, 123).

Additionally, Shell was questioned on her right to be exempt from jury service because of her two year old daughter (Tr. 290-291); Shell did not wish to be exempt from service (Tr. 294). In point of contrast, seated jurors Joan Stiegerwald (#171) and Vera Bloom (#130) both stated that they would rather not serve on the jury (Tr 129-130; 387).

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[9] Interestingly, Stiegerwald and others were questioned as to whether they could put aside their knowledge gained from publicity and focus on the facts adduced at trial (Tr. 118; 173; 204; 380; 437-438). Phyllis Shell, however, was never asked that question (Tr. 292-294).

During the *Batson* hearing, the solicitor attempted a bootstrap justification for his striking of Shell by stating to the trial court that "I also selected a black juror [Vicky Fritz-Hamilton], for that matter, and I'll be glad to—" (Tr. 506). The court took up that reasoning, recalling that "there is one white juror that's married to a black person, for whatever that may have any effect." (Tr. 506). The answer to that bootstrap argument is that it is not a solid justification. Caselaw is clear that the striking of even one black juror for racially motivated reasons violates the precepts of *Batson*, regardless of whether other blacks are seated or whether other blacks are struck for legitimate and neutral reasons. *See United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987); *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986); *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989). Moreover, per our research, no authority exists which holds that acknowledgement of a juror's interracial marriage has any purifying effect so as to purge the prosecutor's discriminatory strike of its intended prejudice.

Clearly, this case is distinguishable from the opinion in *State of South Carolina v. Johnson*, 302 S.C. 294, 395 S.E.2d 167, 168 (1990), wherein the striking of six black jurors was accompanied by neutral justifications. Therein, those jurors were disqualified for various reasons including, *inter alia*, acquaintance and association with defendant, involvement—and conflict—with local law enforcement, and friendship with an unrelated individual who had recently been convicted on criminal charges. *Id.* at 168. In juxtaposition, the facts of the instant case clearly fail to support any racially-neutral strike of Phyllis Shell.

The mandate of *Batson* and its litany of progenitors creates an ideal which is readily definable, yet somewhat illusory in practice.

> *Batson*'s greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors. * * * This flaw has rendered *Batson* ineffective against all but the most obvious examples of racial prejudice[10]—the cases in which a proffered "neutral explanation" plainly betrays an underlying impermissible purpose. To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd.

*Wilkerson v. Texas*, ____ U.S. ____, 110 S.Ct. 292, 295 (1989) (memorandum decision) (Marshall, J. dissenting from denial of petition for writ of certiorari). Yet, it must be remembered that *Batson*'s aim is not merely to minimize discrimination in jury selection, but to *eliminate* it altogether. *David*, 803 F.2d at 1571. Such is not the case at bar. The solicitor offered up his version of legitimate reasons for striking Phyllis Shell, in actuality they were little more than a pretext cloaking a discriminatory purpose.

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[10] *See State of South Carolina v. Tomlin*, 299 S.C. 294, 384 S.E. 2d 707, 710 (1989) (justification that black juror "shucked and jived" was nothing more than an indefensible racial stereotype which violated the principle of *Batson*.)

## CONCLUSION

Because of the fundamental Constitutional question of denial of equal protection in the face of a blatant *Batson* violation, this Court is requested to issue a writ of certiorari to review petitioner Robinson's conviction.

Respectfully submitted,

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# APPENDIX

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**Opinion of the Supreme Court**
**of the State of South Carolina**
**[409 S.E.2d 404 (S.C. 1991)]**

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**STATE of South Carolina, Respondent,**

**v.**

**Noah Ryan ROBINSON, Appellant.**

**No. 23481.**

Supreme Court of South Carolina.

Heard April 1, 1991.

Decided Sept. 23, 1991.

Rehearing Denied Oct. 22, 1991.

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Defendant was convicted of being accessory to felony after the fact, in the Circuit Court, Greenville County, James E. Moore, J., and defendant appealed. The Supreme Court, Gregory, C.J., held that: (1) defendant failed to show any actual prejudice from pretrial publicity, and therefore trial court did not abuse its discretion in denying change of venue; (2) Solicitor's reasons for striking black juror were racially neutral and were not pretext for discrimination; (3) South Carolina Freedom of Information Act exempted discovery of material that was not otherwise discoverable under criminal procedure rule.

Affirmed.

Finney, J., filed dissenting opinion.

* * * * *

GREGORY, Chief Justice:

Appellant was convicted of accessory to felony after the fact and sentenced to ten years imprisonment. We affirm.

Appellant was indicted for criminal conspiracy and murder for the killing of Hambone Barber; he was also indicted for criminal conspiracy and accessory to felony before and after the fact for the stabbing of Janice Denise Rosemond. The Solicitor sought the death penalty for the Barber murder. These charges were tried together.

At trial, the State produced evidence appellant solicited the murder of Hambone Barber committed by members of the El Rukns, a Chicago organization. Barber was gunned down outside a bar in Greenville. A witness to the shooting, Janice Denise Rosemond, identified a member of the El Rukns as the killer and testified to this effect before a federal grand jury in Chicago. Soon thereafter, Rosemond was severely stabbed in her home by an acquaintance, Fred Sweeney. Sweeney testified appellant wanted him to kill Rosemond because "she spilled on one of his guys." Appellant offered Sweeney $5,000 to slit Rosemond's throat. Rosemond, however, survived Sweeney's attack. At Sweeney's request, appellant agreed to send him money to flee to Florida. Sweeney received payments of $500 and $200 through appellant's associate, Jake Oliver. The jury found appellant guilty of accessory to felony after the fact and reached no verdict on all other counts.

Appellant contends the trial judge erred in refusing his motion for a change of venue based on pretrial publicity. Appellant, Jesse Jackson's half-brother, is a well-known member of the black community. He claims the unavoidable notoriety of this case was aggravated by the trial judge's publicized order of stringent court security and

the Solicitor's conduct. He claims the Solicitor made inflammatory remarks to the media and also filed a pretrial memorandum with the court, accessible to the press, detailing the evidence in aggravation of murder.

When a trial judge bases the denial of a motion for change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990); *State v. Owens*, 293 S.C. 161, 359 S.E.2d 275 (1987). Mere exposure to pretrial publicity does not automatically disqualify a prospective juror; the defendant must show actual juror prejudice. *State v. Caldwell, supra.* When jurors are exposed to such publicity, there is no error in refusing a change of venue where jurors are found to have the ability to lay aside any impressions or opinions and render a verdict based on the evidence presented. *Id.*

Upon appellant's initial motion, the trial judge questioned the jury panel regarding impartiality and specifically asked if any juror was influenced by hearing information about the case. When only three potential jurors responded, the trial judge denied the motion for change of venue ruling that he would reconsider it after voir dire. On voir dire, the few jurors who acknowledged hearing any news accounts of the case all stated under oath they could put the information aside and give both the State and appellant a fair and impartial trial. After voir dire, the trial judge again denied appellant's motion for a change of venue.

We find no abuse of discretion in the denial of a change of venue. Appellant has failed to show any actual prejudice from the pretrial publicity in this case and we find no extraordinary circumstances to warrant disturbing the trial judge's decision.

Next, appellant contends the Solicitor exercised his peremptory strikes in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Of the five strikes allowed the Solicitor against regular jurors, he exercised only one and it was used against a black juror, Phyllis Shell. He also used his one strike allowed on the first alternate against a black juror, John Leaks. One black juror sat on the jury; the remaining jurors, including the two alternates, were white.

The Solicitor stated he struck Juror Shell because of "general instability." She had changed employment several times after relatively short periods of employment, she was an unmarried mother of a two-year-old, and she was still living at her parent's home. Further, she admitted on voir dire that she had seen Reverend Fleming, an outspoken advocate of appellant, discussing appellant's case on television.

After the Solicitor stated his reasons for striking Juror Shell, counsel argued the merits of the motion and the trial judge ruled there had been no *Batson* violation. On appeal, appellant complains the Solicitor's reasons for striking Juror Shell were pretextual and that he stated no reason for striking Juror Leaks, the potential alternate juror.

We find the Solicitor's reasons for striking Juror Shell are racially neutral. Further, the burden is on the defendant to prove that the Solicitor's neutral reasons for his strikes were pretextual because they were not applied in a neutral manner. *State v. Johnson*, ____ S.C. ____, 395 S.E.2d 167 (1990). Here, appellant raised no issue to the trial judge regarding any alleged pretext and this issue is not preserved on appeal. *State v. Bailey*, 298 S.C. 1,

377 S.E.2d 581 (1989); *State v. Caldwell*, 283 S.C. 350, 322 S.E.2d 662 (1984). In any event, based on the record, we find appellant's claims of pretext to be without support. As to the striking of Juror Leaks, the potential alternate for whom no explanation was given, appellant waived any error in the Solicitor's lack of explanation by failing to raise it below. *See State v. Martinez*, 294 S.C. 72, 362 S.E.2d 641 (1987).

At the close of presentation of the defense case, appellant's counsel moved for a mistrial on the ground that on voir dire examination a juror had not revealed she knew the Solicitor. The Solicitor denied he knew the juror. He stated he had coached her son in swimming fifteen years earlier.

In *State v. Gulledge*, 277 S.C. 368, 287 S.E.2d 488 (1982), this Court found the trial judge abused his discretion in denying a mistrial where a juror failed to disclose on voir dire that she was related by marriage to a deputy sheriff who viewed the crime scene and had custody of the defendant in the courtroom during trial. The Court held that absent any justification for the juror's failure to disclose her relationship to the deputy sheriff, a mistrial should have been granted. This case, however, is distinguishable on its facts. The Solicitor denied knowing the juror and the only contact between the juror and the Solicitor, if any, was fifteen years before appellant's trial. We find no abuse of discretion in the denial of a mistrial on this ground.

During the Solicitor's direct examination of Henry Harris, an El Rukn gang member allegedly involved in the Barber murder, Harris testified that in the 1980's he was in charge of drug operations for the organization. He was subsequently asked when he first became acquainted with

appellant and he answered " '83 or '84." Appellant then objected and moved for a mistrial on the ground Harris' testimony linked appellant to drug dealing.

This argument is without merit. First, in context, Harris' testimony does not imply appellant was involved in drug dealing merely because he knew appellant during the time Harris was dealing drugs. Harris testified the El Rukns rented a building from appellant where their restaurant was located; there is no testimony linking appellant to the El Rukn's drug dealing activities.

Further, appellant was the first to bring out the El Rukn's involvement in drug dealing. A previous witness, gang member Eugene Hunter, testified appellant was a friend of Jeff Fort, the head of the El Rukns, and was assisting the El Rukns in establishing a legitimate business. On cross-examination, appellant elicited testimony from Hunter that the El Rukns were involved in drug dealing. Since appellant opened the door to this evidence, he cannot complain of prejudice from its admission. *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981).

Appellant further contends he should have been granted a mistrial on the ground of prosecutorial misconduct. Rosemond, the stabbing victim, testified for appellant. Essentially, she denied ever having identified Barber's killer to police; she stated Detective Brannigan literally twisted her wrist to force her to testify before a federal grand jury in Chicago regarding this case. She further testified to her close relationship with appellant: "I look at him as my godfather."

On cross-examination, the Solicitor asked Rosemond if she had written appellant a letter after she was stabbed, which she admitted. The Solicitor asked her to read a line from it: "Take care of my godfather." Appellant then

moved for a mistrial claiming prosecutorial misconduct because the letter was evidence that had been suppressed under a prior ruling by the trial judge. The trial judge ruled the letter had not been suppressed under his prior ruling and therefore the Solicitor was not guilty of prosecutorial misconduct in using it to cross-examine Rosemond.

The record indicates that at the suppression hearing appellant sought the suppression of evidence seized pursuant to search warrants for two different addresses, one for his apartment and one for his office. The following colloquy occurred between counsel and the trial judge:

> MR. SIMONE: I just want to know, Judge, some things from the prosecutor. It won't be necessary for me to ask [the witness] any more questions. Is there any material seized that was taken from a room other than Noah Robinson's room? Do you expect that you want to try to introduce those?
>
> THE COURT: That's a legitimate question.
>
> MR. WATSON: Not that I intend to introduce. There was other stuff seized from other rooms.
>
> MR. SIMONE: But you don't intend to introduce it.
>
> MR. WATSON: That's right.

Appellant then argued the evidence at issue should be suppressed because the supporting affidavit, identical for both search warrants, contained information gathered by an illegal surveillance. In addition, he argued the evidence from appellant's bedroom should be suppressed because police officers forced the bedroom door in arresting appellant's roommate, Jake Oliver. The trial judge ruled this conduct went beyond the scope of a search pursuant to arrest. Though a search warrant was subsequently obtained, the trial judge concluded the evidence seized from the bedroom should be suppressed. He further ruled that the affidavit was valid.

Appellant claims the Solicitor misled him by stating the only evidence he sought to introduce was taken from appellant's bedroom. In context, however, the above quoted colloquy indicates the discussion was regarding evidence sought to be introduced from appellant's *apartment*. The Solicitor produced evidence the letter was in fact seized from appellant's office. The trial judge's ruling that the affidavit was valid governed the suppression of evidence taken from appellant's office since the affidavit was the only ground upon which the admission of this evidence was challenged.

We conclude the record of the suppression hearing supports the trial judge's ruling on the motion for mistrial that the letter used by the Solicitor in cross-examining Rosemond was not evidence that was suppressed under his prior ruling. Since there was no ruling suppressing evidence from appellant's office, the Solicitor was not guilty of misconduct in using this letter. Moreover, we find no prejudice to appellant from the Solicitor's reference to the letter since Rosemond testified to the same effect on direct examination regarding her relationship with appellant.

The final issue we address regards appellant's pretrial discovery request for statements of all prosecution witnesses and police investigative reports. The trial judge ruled that pursuant to Rule 5(a)(2), SCRCrimP, investigative reports are not discoverable and witness statements must be provided only after a witness has testified. Appellant contends that this evidence should have been allowed for discovery under the Freedom of Information Act (FOIA). We disagree.

S.C.Code Ann. § 30-4-40(a)(3) (1991) provides that records of law enforcement agencies are exempt from the

FOIA "if disclosure of the information would harm the agency by . . . (B) the premature release of information to be used in a prospective law enforcement action."

In construing the federal FOIA, the United States Supreme Court has held that the FOIA does not supplement or displace the applicable rules of discovery. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989); *National Labor Relations Board v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). An exemption to disclosure based on "interference with enforcement proceedings" has been construed to exempt disclosure of any information that would give a party litigant greater access to the government's opposing case. *Robbins Tire, supra.* The government need not prove the need for nondisclosure on a case-by-case basis. *Id.*

Similarly, we conclude the South Carolina FOIA exempts discovery of material that is not otherwise discoverable under Rule 5(a)(2). The specific exemption under § 30-4-40(a)(3)(B) for "the premature release of information to be used in a prospective law enforcement action" clearly exempts information regarding pending criminal prosecutions. No specific showing of harm is required by the State if the request involves such material.

Appellant's issues 7, 8, and 9 involve evidentiary rulings relating to testimony relevant only to the murder charges. Appellant was not convicted of these offenses and we need not address these issues. *See State v. Sherard*, ____ S.C. ____, 399 S.E.2d 595 (1991) (verdict will not be reversed for insubstantial errors not affecting the result of the trial). Appellant's remaining issues are disposed of pursuant to Supreme Court Rule 23 and the following authority. Issue 2: *State v. Green*, 301 S.C. 347, 392 S.E.2d

157 (1990) (challenges for cause will not be reviewed if peremptory strikes not exhausted); Issue 10: *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581 (1989) (no objection); Issue 12: *State v. Alexander*, ____ S.C. ____, 401 S.E.2d 146 (1991) (no prejudice from inconsistent verdicts); Issue 13: *State v. Sullivan*, 277 S.C. 35, 282 S.E.2d 838 (1981) (sentence within statutory maximum).

The judgment of the circuit court is AFFIRMED.

HARWELL, CHANDLER and TOAL, JJ., concur.

FINNEY, J., dissenting in separate opinion.

FINNEY, Justice (dissenting):

I respectfully dissent. In my view, the solicitor's conduct contributed materially to pretrial publicity and exacerbated prejudice to the appellant. Additionally, I would find that the solicitor failed to articulate a racially neutral reason for striking a black prospective juror, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). I would reverse and remand for a new trial.

First, the problem of pretrial publicity was compounded by dissemination of a memorandum filed by the solicitor.[1] Counsel for appellant sought and obtained an agreement to prevent publicity surrounding the Notice of Evidence in Aggravation which would be served less than a week before jury selection and almost four months after the state announced its intention to seek the death penalty. The state agreed to provide the Notice to appellant's counsel, who would acknowledge receipt, and the Notice

[1] The solicitor acknowledged that the publicity surrounding this case was unprecedented.

would not be filed. On January 10, 1989, the solicitor filed a memorandum with the Clerk of Court, which stated in part:

> On Monday, I discussed with Pat Paschal certain evidence I intend to present in the penalty phase of Mr. Robinson's trial. Because the evidence to be offered includes evidence of extensive criminal conduct, including other murder-for-hires, Pat requested that I either not file the Notice of Evidence in Aggravation or that, if filed, I not detail the evidence to be offered . . .

The memorandum was picked up by the press in routine checks of courthouse records and extensively publicized through the news media.

The solicitor was not mandated by law to file the Notice of Evidence in Aggravation with the court. The state is only required to furnish written notice of evidence in aggravation to an accused prior to trial. *See* S.C.Code Ann. § 16-3-20(B) (1976). Also noteworthy is the fact that the state did not file all other non-compulsory trial-related memoranda. When viewed in totality and under the unique circumstances of this case, it is clear from the record that filing of the memorandum was contrived to fuel publicity and further prejudice the accused.

Additionally, the news media reported statements by the solicitor which were, in my view, inflammatory. In comments concerning his plea bargain with appellant's co-defendants, the solicitor stated, "it takes a crook to catch a crook." He also indicated the timing of the arrest was due to "beatings," "stabbings" and "dead bodies" attributable to the appellant.

In my opinion, this record is an egregious example of a prosecutor striving to obtain a conviction regardless of the costs. The solicitor's conduct aggravated notoriety sur-

rounding this case with the resulting effect that prospective jurors formed opinions based upon news accounts. One venireperson stated that he had formed the opinion that appellant was guilty based upon what he had read in newspapers.

In *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935)), this Court reiterated the following cautionary note to prosecutors:

> . . . He [the prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*State v. Dawkins*, 377 S.E.2d at 299.

I would hold that the solicitor's conduct contributed substantially to circumstances of inherent or presumptive prejudice and created actual prejudice which deprived the appellant of the right to a fair and impartial trial.

Next, I would reverse on the ground that the solicitor violated *Batson v. Kentucky*, *supra*. The state exercised peremptory strikes against one black venireperson presented as a prospective juror, one black venireperson presented as an alternate and seated one black juror. In a *Batson* hearing, the solicitor stated that he struck the black prospective juror because of instability due to an erratic work history and parenting a child out of wedlock.

While an erratic work history may be a neutral reason, I find nothing in this record which indicates periods of unemployment or that the prospective juror was an undependable employee. When asked about her employment

history, the prospective juror stated that she had been on her present job for four months, had worked for her preceding employer for a year, and had been on her prior job for a year and a half.

As to his second reason, I am unable to determine from the record before this Court how the circumstances of the birth of the prospective juror's child bears any relationship to the particular case to be tried. Moreover, the United States Supreme Court has held generally that illegitimacy may not be used as a basis for unjustified discrimination. *See Reed v. Campbell*, 476 U.S. 852, 106 S. Ct. 2234, 90 L.Ed.2d 858 (1986).

A prosecutor is required to articulate a racially neutral explanation related to the particular case to be tried. Such explanation must be a neutral, clear and reasonably specific explanation of a legitimate reason for exercising the challenges. *Batson*, 106 S.Ct. at 1724.

In my view, the solicitor's articulated reason for striking the black prospective juror was neither racially neutral nor related to the particular case to be tried.

I would reverse the case and remand for a new trial.

**Petition for Rehearing in the Supreme Court of the State of South Carolina**

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

APPEAL FROM GREENVILLE COUNTY
HONORABLE JAMES E. MOORE, JUDGE

---

STATE OF SOUTH CAROLINA,

Respondent,

vs.

NOAH RYAN ROBINSON,

Appellant.

---

PETITION FOR REHEARING

---

Appellant petitions this Court for a rehearing of this appeal on the following grounds:

1. The Court on September 23, 1991 filed its opinion, *State of South Carolina vs. Noah Ryan Robinson*, Opinion No. 23481, affirming Appellant's conviction and sentence for Accessory after the fact of a felony.

2. The Court in its opinion overlooked the fact that the pre-trial security order of the trial judge, combined with the pre-trial extrajudicial statements of the Solicitor which violated the Code of Professional Conduct created circumstances of inherent or presumptive prejudice.

3. The Court in its opinion overlooked the fact that the trial judge in his *voir dire* of prospective jurors denied Appellant's motion to strike some jurors whose *voir dire* responses did not reflect that they could sufficiently disabuse themselves of publicity or otherwise provide a fair and impartial trial to Appellant.

4. The Court in its opinion overlooked the fact that the trial judge in his *voir dire* of prospective jurors questioned some jurors in a fashion that impermissibly tended to shift the burden of proof to Appellant to undo the effects of pre-trial publicity resulting from the trial judge's pre-trial order and the Solicitor's pre-trial extra-judicial remarks, and the Appellant was prejudiced by having to strike some of the jurors so informed by the trial judge.

5. The Court in its opinion overlooked the fact that the curative measure of *voir dire* examination of the jurors was inappropriate and inadequate under the circumstances of this case, as demonstrated by the record.

6. The Court in its opinion overlooked the fact that the record shows that the black juror Phyllis Shell who was struck by the Solicitor did not evidence a history of personal or employment instability.

7. The Court in its opinion overlooked the fact that the primary reason given by the Solicitor in striking the black juror Shell for "instability" was her illegitimate child, a factor that would be invideously discriminatory and would always tend to result in disproportionate exclusion of blacks from service.

8. The Court in its opinion misapprehended and overlooked the fact that the trial judge denied the Appellant's request that a juror be replaced for improper conduct affect-

ing impartiality without first holding a hearing to determine whether or not prejudice had actually resulted.

9. The Court in its opinion overlooked the fact that, with respect to the direct examination of Henry Harris which linked Appellant to drug dealing, the Solicitor stated unequivocally in argument to the judge that the relationship suggested "is drug related."

10. The Court in its opinion misapprehended the ruling of the trial judge in concluding that the trial judge determined that the affidavits in support of the search warrants were valid.

11. The Court in its opinion overlooked the fact that no evidence was seized other than pursuant to the search warrants, that the same information which derived from the illegal entry into a room of Appellant's apartment supported the identical affidavit for both warrants, and that if the search of the Appellant's apartment was illegal, the search of the Appellant's office was also illegal for the same reasons.

12. The Court in its opinion overlooked the fact that the Solicitor thought that the letter used by him to cross-examine the witness Rosemond had been suppressed, as did counsel for the Appellant, and that the Solicitor therefore acted improperly in using the letter in cross-examination.

13. The Court in its opinion misapprehended the record in stating that the evidentiary rulings in issues 7, 8, and 9 "involve . . . testimony relevant only to the murder charges" and overlooked the fact that the Rosemond and Barber cases were tried together, and therefore the evidence in the Rosemond case was relevant to Appellant's

guilty knowledge and intent in the Barber killing, and evidence in the Barber killing provided the alleged motive for the Rosemond assault.

14. The Court in its opinion overlooked the fact that the evidentiary rulings in issues 7, 8, and 9 were plain error based upon cited precedents of the Court, and that these errors were prejudicial and warrant reversal.

WHEREFORE, the Appellant prays that this Court grant Appellant rehearing of this appeal.

BY: /s/ RUSSELL D. GHENT
Attorney for Petitioner,
Appellant Noah Robinson
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Date: October 1, 1991
Spartanburg, South Carolina.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

APPEAL FROM GREENVILLE COUNTY
HONORABLE JAMES E. MOORE, JUDGE

---

STATE OF SOUTH CAROLINA,

Respondent,

vs.

NOAH RYAN ROBINSON,

Appellant.

---

## CERTIFICATE OF MERIT

---

The undersigned counsel avers as follows:

1. He is an attorney and a practicing member of the South Carolina Bar.

2. He has reviewed the Opinion of the Supreme Court in *State of South Carolina vs. Noah Ryan Robinson*, Opinion No. 23481, and the Petition for Rehearing of said appeal.

3. He is not concerned nor involved in said case, and believes there to be merit in the grounds alleged for rehearing.

BY: /s/ DAVID E. TURNIPSEED
David E. Turnipseed

Date: Oct. 1, 1991

*[Letterhead Of]*

THE SUPREME COURT OF SOUTH CAROLINA

Clyde N. Davis, Jr.
Clerk
Brenda F. Shealy
Deputy Clerk

P.O. Box 11330
Columbia, S.C. 29211
Phone No. 734-1060

October 22, 1991

Russell D. Ghent, Esquire
P.O. Box 4409
Spartanburg, S. C. 29305-4409

Re: The State v. Noah Ryan Robinson

Dear Mr. Ghent:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing denied.

s/ George T. Gregory, Jr. C.J.
s/ David W. Harwell A.J.
s/ A. Lee Chandler A.J.
s/ Ernest A. Finney, Jr. A.J.
s/ Jean H. Toal A.J.

October 22, 1991."

The remittitur in this matter is today being forwarded to the Clerk of Court for Greenville County.

Sincerely yours,

/s/ CLYDE N. DAVIS, JR.
CLERK

CND,Jr./dmh
cc: Howard P. Pat Paschal, Esquire
The Honorable Donald J. Zelenka

(2)

Supreme Court, U.S.
FILED
FEB 21 1992
OFFICE OF THE CLERK

No. 91-1204

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

NOAH RYAN ROBINSON,

Petitioner,

vs

STATE OF SOUTH CAROLINA,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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ATTORNEYS FOR
RESPONDENT

## PETITIONER'S QUESTION PRESENTED FOR REVIEW

I. Whether the racially-motivated strike of a black unmarried female venireperson from the petit jury violated the equal protection principle of Batson v. Kentucky?

## RESPONDENT'S QUESTION PRESENTED

I. Whether the state court properly found the reasons for utilizing a peremptory challenge were racially neutral, which were not clearly erroneous under Hernandez v. New York, ___U.S.___ (1991)?

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No. 91-1204

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

NOAH RYAN ROBINSON,

Petitioner,

vs

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent State of South Carolina prays that the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina entered on September 23, 1991, be denied.

OPINION BELOW

The final judgment of the trial court was not printed in an official reporter. The decision of the Supreme Court of South Carolina is reported as State of South Carolina v. Noah Ryan Robinson, ___S.C.-

___, 409 S.E.2d 404 (1991). The Supreme Court of South Carolina decision was rendered on September 23, 1991. The opinion below is reprinted in the Appendix to the Petition at pages 1a-13a.

## JURISDICTION

The judgment of the Supreme Court of South Carolina affirming Petitioner's conviction and sentence was entered on September 23, 1991. Petitioner filed a Motion for Rehearing/Reconsideration which was denied on October 22, 1991. (Order denying Petitioner's Motion for Rehearing/Reconsideration is reprinted in the Appendix to the Petition at page 19a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3) (1982).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI, provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed ... to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV, provides in part:

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The Petition for Certiorari comes from the affirmance of a January 28, 1989, conviction of accessory after the fact to a felony and sentence of ten years in Greenville County, South Carolina, for the Petitioner, Noah Ryan Robinson, involving the stabbing of Janice Rosemond. The victim had been a witness to the 1986 shooting death of Leroy "Hambone" Barber.

In June, 1988, the Petitioner, Noah Robinson, was arrested in Greenville County and charged with obstruction of justice, intimidation of a witness, conspiracy, and accessory before and after the fact of a felony based upon allegations that he was involved in the stabbing of Janice Denise Rosemond. The Petitioner was released on bond. In August, 1988, he was indicted on the above charges.

Subsequently, on September 20, 1988, Petitioner was arrested for crimes arising form the murder of Mr. Barber. On October 24, 1988, the state served a Notice of Intention to Seek the Death Penalty. On November 29, 1988, the Petitioner was indicted for murder and criminal conspiracy to commit murder. On December 9, 1988, the trial court granted the Motion for Severance and set bond.

The matter was called for trial on January 16, 1988, before the Honorable

James E. Moore. During jury selection, the state exercised one (1) peremptory strike for a petit juror and one (1) peremptory strike for an alternate. The Petitioner withdrew his Motion to Sever and the case proceeded on all charges.

At trial, the state produced evidence Petitioner solicited the murder of Hambone Barber committed by members of the El Rukns, a Chicago organization. Barber was gunned down outside a bar in Greenville. A witness to the shooting, Janice Denise Rosemond, identified a member of the El Rukns as the killer and testified to this effect before a federal grand jury in Chicago. Soon thereafter, Rosemond was severely stabbed in her home by an acquaintance, Fred Sweeney. Sweeney testified Petitioner wanted him to kill Rosemond because "she spilled on one of his guys." Petitioner offered Sweeney $5,000 to slit Rosemond's throat. Rosemond,

however, survived Sweeney's attack. At Sweeney's request, Petitioner agreed to send him money to flee to Florida. Sweeney received payments of $500 and $200 through Petitioner's associate, Jake Oliver. The jury found Petitioner guilty of accessory to felony after the fact and reached no verdict on all other counts.

The Petitioner appealed to the Supreme Court of South Carolina. One of the issues raised in the appeal concerned whether the Solicitor exercised his peremptory challenges in a racially discriminatory manner. Without finding the existence of a prima facie case of discrimination on the basis of Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court made the following conclusion:

> We find the Solicitor's reasons for striking Juror Shell are racially neutral. Further, the burden is on the defendant to prove that the Solicitor's neutral reasons for his strikes were pretextual because they

were not applied in a neutral manner. State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990). Here, Appellant raised no issue to the trial judge regarding any alleged pretext and this issue is not preserved on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984). In any event, based on the record, we find appellant's claims of pretext to be without support. As to the striking of Juror Leaks, the potential alternate for whom no explanation was given, appellant waived any error in the Solicitor's lack of explanation by failing to raise it below. See State v. Martinez, 294 S.C. 72, 362 S.E.2d 641 (1987).

(Appendix to the Petition, pp. 4a-5a).

REASONS FOR DENYING THE WRIT

The state court finding that the reason for the peremptory challenge was racially neutral is not clearly erroneous.

In the recent decision of this Court in Herandez v. N.Y., 500 U.S. ___, 111 S.Ct. 1859 (1991), the Court declared that in reviewing a claim for relief under Batson, supra, arising from a state prose-

cution, the Court will decline to overturn a state trial court's finding on the issue of discriminatory intent unless the Court was convinced that its determination was "clearly erroneous." Particularly, this Court declared that it will give such findings deference, particularly on issues involving credibility. 111 S.Ct. 1873.

Respondent submits that certiorari is not warranted here because this record reveals that the Court's finding was not clearly erroneous under the Hernandez test. In this case, individual voir dire was conducted on a panel of thirty-eight (38) prospective jurors and alternates. Of that thirty-eight (38), eleven (11) strikes were exercised by the Court on ten (10) white jurors and one (1) black juror, two (2) strikes were exercised by the state, both jurors stricken were black, and eleven (11) strikes were exercised by

the Petitioner, all jurors stricken by Petitioner being white.

Before jury selection began, the Solicitor suggested a jury selection system that he felt would best facilitate and ease matters should a Batson issue arise. (Tr. p. 46, l. 24 - p. 47, l. 15). The prosecutor repeatedly stated his feeling that a Batson issue would not come up (Tr. p. 46, ll. 24-25; p. 47, ll. 3, 8-9, and 14-15), yet he made every effort to accommodate the Court if such an eventuality were to arise, by suggesting what he felt from experience was the most expedient jury selection system to use, the "panel" system of selection. The Petitioner suggested a different system, but upon the decision by the trial judge to use the "panel" system, Petitioner offered no objection.

The first panel of jurors included four (4) blacks, one (1) of whom was

stricken by the trial judge based upon her expressed opposition to the death penalty in all cases. (Tr. pp. 1641, 446, l. 10 - p. 448, l. 20). The solicitor exercised two (2) peremptory strikes during individual voir dire of the prospective jurors. Both of these jurors stricken by the state were black, potential juror number 162, Phyllis A. Shell (Tr. pp. 1641, 285-295), and prospective alternate juror number 97, John H. Leaks (Tr. pp. 1641; 440-446, l. 9). The fourth black on the first panel of jurors, juror number 65, Vicky Lane Fritz-Hamilton (Tr. p. 1641), was accepted by the solicitor. The final jury consisted of eleven (11) white members, one (1) black member, and two (2) white alternates.

A so-called Batson hearing was held because the solicitor used one of his five peremptory challenges to strike a black juror when the defendant was black. Under

South Carolina procedure established after Batson, there is no requirement for a prima facie showing of discrimination before a Batson hearing is convened. State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987).

The solicitor had used a peremptory strike against juror 162, Phyllis Shell. Although the trial judge declared that he was not convinced Petitioner had made a prima facie showing of discrimination under Batson, he did require the state to give its reasons for the striking of one juror. (Tr. p. 506, ll. 16-22). The solicitor then offered the following racially neutral reasons for striking juror 162, Miss Shell:

> I struck the first juror because of general instability and factors surrounding her life that showed a general instability, including a very erratic work history. I believe she had been on her present job four months and she had been on three different jobs for the three years

up to this point in time. She had a two-year-old child out of wedlock. She was not married, she was living at home. She said at one point in time she had never seen anything on TV about the case. I would submit that the defense, then a white juror said that, found that very incredible. When she was confronted again, she admitted that she had seen things on TV about the case. When I went further with her, she admitted that she had seen Reverend Fleming on TV about the case .... [H]e's been the most outspoken person in the community concerning this being a racial prosecution .... You've got the exhibits of the press releases issued by Mr. Robinson. On the top of his press releases, they all say, 'For further information call Reverent Fleming.' I would submit in addition to that, the defense asked her absolutely no questions that would lead the state to believe that they got something, know something about her that would make any prosecutor, I think, suspect as to why they would ask absolutely no questions of a juror. There were no whites that had as an erratic work history, there was no white who had a two-year-old child out of wedlock, or any children out of wedlock. There was, as far as I know, no white who was living at home. There was no white that had the general instability of this juror.

(Tr. p. 507, l. 1 - p. 508, l. 2; p. 508, ll. 5-9).

The solicitor provided in a clear, reasonable and neutral manner, a wealth of legitimate non-racial reasons for the striking of juror 162, Shell. State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987). If, however, the trial court does hold such a hearing as advised in State v. Jones, 358 S.E.2d at 703, "under Batson, the trial court must examine all relevant circumstances in determining whether a defendant has shown a prima facie case of purposeful discrimination in the state's exercise of its peremptory strikes" and that determining "whether such a showing has been made" is up to the discretion of the trial judge. State v. Smith, 293 S.C. 22, 358 S.E.2d at 390 (1987). Those racially neutral reasons must be clear and reasonably specific legitimate, but they "do not have to rise to the level of

justifying an exercise of a challenge for cause." State v. Tomlin, 384 S.E.2d 707, 709 (1989). The solicitor stated that he chose to strike juror 162, Shell, because of a general instability in her life, including a "very erratic work history." (Tr. p. 507, ll. 1-3). In State v. Martinez, 294 S.E. 72, 362 S.E.2d 641 (1987), chronic unemployment has been accepted as a racially neutral reason for striking black potential jurors. It follows that an "erratic work history" would also fall into a racially neutral category under the same reasoning.

In his Petition, Petitioner complains that the State Supreme Court's conclusion that "appellant raised no issue to the trial judge regarding any alleged pretext and this issue is not preserved for an appeal," citing State v. Bailey, supra, was incorrect. (Petition, p. 8, n. 3). It is clear that the court is instructing

that Robinson's analysis for the first time on appeal of the claimed existence of certain factors on the other jurors did not satisfy any Batson burden where the particular factual arguments comparing certain specific jurors with Ms. Shell had not been made by trial counsel before the trial judge as required before the same argument can be raised in an appeal under State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); State v. Caldwell, supra. See Harris v. Reed, 489 U.S. 255 (1989). Since the state court relied upon this specific state procedural bar, certiorari review should be denied.

Nevertheless, the state court rejected the claim under an alternative basis. Petitioner complains the solicitor's use of "general instability" as an explanation is insufficient because he did not strike whites with what Petitioner finds as arguable "instabilities" in their lives. This

argument ignores the fact that no other juror had the sizeable combination of factors found in the life of juror 162, Shell: erratic employment, a child born out of wedlock, unmarried, and still living in her parent's home. (Tr. p. 507, ll. 1-7). Petitioner's arguments are reaching at best when he attempts to compare the above listed reasons for juror 162's general unreliability and dubious worth as a juror to juror number 24, Monica Carol Burwell, a white female whose "instability" was that she "lived out of wedlock with her fiance" (Appellant's Brief, p. 47), juror number 10, Laverne M. Belue, a white female whose "instability" was that she was separated from her husband (Appellant's Brief, p. 47), and juror number 182, Nancy Kay Vaughn, a white female whose "instability" was that she was divorced. (Appellant's Brief, p. 47). Petitioner reached new heights in his

search for a similarity between juror 162's general instability and the life situation of any other juror when by use of mathematics he questioned the legitimacy of a child of a married juror, juror number 21, Jacqueline R. Broyles, and the resulting "instability" this "possibility" raised. (Appellant's Brief, p. 48).

Petitioner argues juror number 13, Vera Bloom, had an apparent "instability" in her life because she stated she would "rather be home" with her husband than sequestered with a jury of strangers during a death penalty case. (Appellant's Brief, p. 48). To suggest that this feeling by the juror is anything less than natural is absurd and Petitioner has chosen to ignore the trial judge's question as to whether her feeling would interfere with her ability to render a fair and impartial verdict and the jury's

response, "no." (Tr. p. 387, ll. 24 and 25; p. 388, ll. 1-3).

In addition to the listed instabilities in the life of Phyllis Shell, juror number 162, the solicitor was concerned with the way her answers about pretrial publicity changed dramatically during questioning about recalling favorable Robinson publicity, a reasonable and legitimate reason for striking a juror. When asked if she had seen anything on TV about the case and if anything stuck out in her mind of what she had seen, the juror replied, "no, I don't really have time to get into it." (Tr. p. 292, ll. 10-17). As questioning continued, juror number 162 admitted to having seen Noah Robinson, the solicitor himself, and Reverend Fleming on television. (Tr. p. 293, ll. 18-25; p. 294, ll. 1-9). In his Petition, Robinson concedes that "Reverend Fleming is a staunch and vocal supporter

of Noah Robinson, who championed Robinson's cause tirelessly." (Petition, p. 14, n. 8). Certainly, a reasonable prosecutor would want to strike a juror who was apparently less than candid about these influences upon questioning.

In the Petition, Petitioner asserts that illegitimacy and single parenthood is a prevalent fact of life in the black community and such would result in a disproportionate exclusion of black persons from service on the jury. The problem with the Petitioner's assertion in a Batson context is not whether the solicitor's reason would disproportionately exclude blacks, but whether the reason evidences a purposeful discriminatory intent to exclude blacks because of their race. As Hernandez stated:

> If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge

> may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.

Hernandez, supra, 111 S.Ct. at 1868. The trial judge in this case chose to believe the prosecutor's race-neutral "combination" explanation. As the trial court stated:

> This court is of the opinion that the solicitor has stated a racially neutral reason for exercising peremptory challenge or strike. There was, agreed to by the solicitor, a black juror when he had strikes remaining. There certainly was no pattern.

(Tr. p. 510, ll. 12-20). This finding, based upon the record, in its entirety is not clearly erroneous. Petitioner's arguments have focused entirely on isolated examples of questioning taken out of the context of the entire jury panel subjected to voir dire. As the record demonstrates, there is little or no similarity of background between Phyllis

Shell, juror number 162, and that of the other jurors. Disparate jurors of necessity bring about different lines of questioning. There is nothing inherently prejudicial in pursuing a line of questioning to its logical end. The solicitor gave solid, clearcut, legitimate reasons for his peremptory challenge of juror 162 with no hint of pretext. The trial judge found that Petitioner did not make a prima facie showing of discrimination and absent any showing that his finding was clearly erroneous the determination of the trial judge will not be reversed. Hernandez, supra. Certiorari must be denied.

## CONCLUSION

For all the foregoing reasons, certiorari must be denied.

Respectfully submitted,

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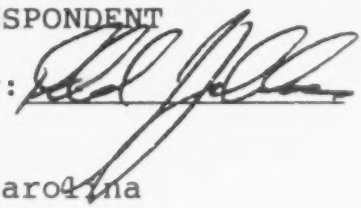
By: 

February 21, 1992
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